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In the

SUPREME COURT

of the United States

No. 74-1264

No. _____

UNITED STATES OF AMERICA,

Respondent

vs.

FREIDA MADISON and
ROGER MADISON,

Petitioners

Petition for a Writ of Certiorari from the United States Court of Appeals for the Fourth Circuit.

HERBERT JEROME BASS
Suite 1410
Number Two Penn Center Plaza
Philadelphia, Pennsylvania 19102

LAWRENCE E. FREEDMAN
(STEPHEN J. McCLURE on brief)
P.O. Box 25
Alexandria, Virginia 22313

Attorneys for Petitioners

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PETITION

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SUPREME COURT

of the United States

UNITED STATES OF AMERICA,
Respondent

vs.

FREIDA MADISON and
ROGER MADISON
Petitioners

COME NOW your Petitioners, Roger Madison and Freida Madison, husband and wife, and respectfully pray this Court to grant them a writ of certiorari in respect to judgments of conviction entered against them by the United States District Court for the Eastern District of Virginia, affirmed by the United States Court of Appeals for the Fourth Circuit.

REPORT OF OPINIONS

No opinions were delivered in the instant case either by the United States District Court for the Eastern District of Virginia, Alexandria Division, nor by the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF GROUNDS FOR INVOKING JURISDICTION OF THIS COURT

On May 10, 1973, the United States District Court for the Eastern District of Virginia, Alexandria Division, entered judgments of conviction against each of the Petitioners on two counts of distribution of controlled substances and one count of possession of controlled substances with intent to distribute (Criminal Docket 67-73-A). It is these judgments of conviction which Petitioners ask this Court to review.

On June 15, 1973, Petitioner Roger Madison was sentenced to eight years on each count concurrently to be eligible for parole after two years with a special parole of three years; Petitioner Freida

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Madison was sentenced to five years on each count concurrently, but execution was suspended and she was placed on supervised parole for five years.

On June 15, 1973, appeal was noted to the United States Court of Appeals for the Fourth Circuit (73-2130, 73-2131). Oral Argument was heard on February 6, 1975. All the questions presented by this Petition were raised in that appeal.

On March 6, 1975, the United States Court of Appeals for the Fourth Circuit affirmed the judgments of conviction against both Petitioners. On April 5, 1975, this Petition for a writ of certiorari was filed with this Court.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is the United States Code, Title 28, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether, when Petitioner's uncontradicted testimony was that government employee SE22084 had supplied Petitioners with the contraband drugs which the Petitioners were charged with distributing or intending to distribute, the Trial Court erred either in refusing to grant Petitioners' motion for acquittal on the grounds of entrapment as a matter of law, or in failing to instruct the

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jury that the government must prove beyond a reasonable doubt that government employee SE22084 had not supplied Petitioners with the contraband drugs.

2. Whether the jury charge given by the Trial Court improperly shifted the burden of proof from the government to Petitioners by failing to include an instruction that inferences adverse to the government's case sufficient to raise a reasonable doubt could be permissibly drawn from the government's failure to produce government employee SE22084 where this witness was inaccessible to Petitioners, but, as a government employee, was accessible to the government, and by making a comment on the evidence that required the jury to speculate on matters not in evidence.

3. Whether Petitioners were denied counsel of their own choosing when the Trial Court refused to grant a brief continuance of trial because retained counsel of Petitioners' choice was temporarily too ill to represent them at trial.

RELEVANT STATUTES

AND

CONSTITUTIONAL PROVISIONS

Petitioners were convicted of violations of the United States Code, Title 21, Section 841(a)(1), which in relevant part reads: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a

controlled substance."

All three questions presented for review in this case involve the Fifth Amendment to the Constitution of the United States, which in relevant part reads: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The third question presented for review in this case also involves the Sixth Amendment to the Constitution of the United States, which in relevant part reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Petitioners were each indicted at the term of the federal Grant Jury sitting in the Eastern District of Virginia, Alexandria Division, in March, 1973, of three counts of possession of contraband drugs with intent to distribute and three counts of distribution of contraband drugs, all in violation of the United States Code, Title 21, Section 841(a)(1). A jury trial was held on

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May 10, 1973, Judge Albert V. Bryan, Jr., presiding.

(a) Statement of facts material to the first question presented for review.

At trial, the government presented testimony from two government agents who had obtained contraband drugs from Petitioners on two separate occasions, and the government agent who had arrested Petitioners in possession of contraband drugs on a third occasion. In his testimony, Petitioner Roger Madison admitted distributing the contraband drugs on the first two occasions and also possessing the contraband drugs on the third occasion with intent to distribute.

Roger Madison further testified that government employee SE22084, known only to him by the cover name "Rebecca Burley," had entered into a sexual relationship with him, revealed she was a user of contraband drugs, and thereafter often importuned him to sell contraband drugs for the purpose of supplying her with money. She feigned an inability to consummate these sales herself, and

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asked him to act in her place without revealing her involvement. When he finally agreed to sell contraband drugs for her, government employee SE22084 not only arranged the time, place, purchaser and terms for each sale, but also provided all the contraband drugs involved. He also testified that his wife's participation was the result of his deceptions of her about the nature of the proceedings and of his relationship with government employee SE22084.

Government employee SE22084 was not called by the government to testify in rebuttal of Roger Madison's testimony, nor did the government offer any other rebuttal evidence. It was also uncontradicted that these three occasions were Petitioners' sole contact with contraband drugs, and that Petitioners had never before been involved in these drugs as sellers, purchasers or users.

At the close of the evidence, Petitioners' counsel moved for a judgment of acquittal, citing United States v. Bueno, 447 Fed. 2d 903 (Fifth Cir., 1971). The Trial Court denied the motion, denying

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Petitioners any further reliance on Bueno by finding Petitioners' case distinguishable (TR 84).

(b) Statement of facts material to the second question presented for review.

At trial, Petitioners' counsel requested the Court to instruct the jury that the government's failure to produce the testimony of government employee SE22084 in rebuttal of Roger Madison's testimony could justify an inference that her testimony would be adverse to the government's case. Government employee SE22084 was, as a government employee, a witness accessible to the government, but not even her true name was available to the Defense since the government objected to its revelation even at trial. The Trial Court refused to grant this missing witness instruction, and Petitioners' counsel was thus unable to argue to the jury that a reasonable doubt could easily and justifiably arise from her failure to testify in rebuttal of Roger Madison's testimony (TR 97-98).

In instructing the jury, the Trial Court made the following comment on the evidence, set out here

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in relevant part (TR 95):

"The issue of entrapment depends on whether either of the defendants was an innocent person in whose mind the idea of criminal activity was implanted by someone acting on behalf of the government. Was that the case, or did the defendants already have a disposition to commit a crime and the person acting on behalf of the government merely presented the opportunity? Which of these is true, of course, depends on the testimony of Mr. Roger Madison as to how he first became involved, why he became involved and his testimony concerning how he behaved after he became involved.

If you believe his testimony, he and his wife are entitled to acquittal. Whether or not you do believe it, it is entirely up to the jury."

Counsel for Petitioners objected to this comment on the grounds that, since there was no evidence of previous disposition to commit a crime, the comment would cause the jury to go outside the evidence and conjecture about disposition to commit crime. The Court overruled the objection (TR 96-97).

(c) Statement of facts material to the third question presented for review.

After their arrest, Petitioners retained Herbert Bass of Philadelphia, Pennsylvania, to represent them, who, in accordance with the local rules of Court, associated himself with J. Ronald Lynch of Alexandria, Virginia, as local counsel.

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Mr. Bass was to have total responsibility for the trial, and Mr. Lynch was to be merely local counsel of record. Trial was set for May 3, 1973.

Prior to trial, Mr. Bass became ill with chronic spastic collitis with acute exhaustion. Approximately ten days before trial, Mr. Bass was advised by his personal physician to refrain from trial work for at least three weeks and a report from his physician was provided the Trial Court. On the basis of this, Mr. Bass immediately sought a continuance of the trial for thirty days.

The Trial Court refused to grant this request for a continuance unless Mr. Bass would certify not only that he was unable to carry on trial work, but also that he was unable to appear in his office for any reason. Although too sick to carry on trial work, he could not certify that he would be unable to appear at his office for any reason during the whole three week period. On the morning of May 3, 1973, Mr. Bass was at home sick in bed.

The Trial Court refused to permit Petitioners to be represented any longer by Mr. Bass, a ruling

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at least partially due to the Court's expressed hostility to non-local counsel, the Court ordered Petitioners to obtain local counsel within twenty-four hours. After all but directing Petitioners to retain Mr. Lynch, the Court granted a one week continuance as a matter of courtesy to local counsel. Trial was thereafter held on May 10, 1973, with Mr. Lynch representing Petitioners.

ARGUMENT

I. Whether, when Petitioner's uncontradicted testimony was that government employee SE22084 had supplied Petitioners with the contraband drugs which the Petitioners were charged with distributing or intending to distribute, the Trial Court erred either in refusing to grant Petitioners' motion for acquittal on the grounds of entrapment as a matter of law, or in failing to instruct the jury that the government must prove beyond a reasonable doubt that government employee SE22084 had not supplied Petitioners with the contraband drugs.

The first question presented for review by Petitioners is whether the doctrine of entrapment set forth by the United States Court of Appeals for the Fifth Circuit in United States v. Bueno, 447 Fed.2d 903 (1971) has continuing validity in the light of this Court's decision in United States v. Russell, 19 S.Ct. 1637, 411 U.S. 423 (1973).

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Petitioners urge on this Court three interrelated reasons for granting certiorari in respect of this first question presented for review:

(a) There is great conflict among the Courts of Appeals of the various Circuits in their decisions on the Bueno entrapment defense presented in Petitioners' case.

(b) This Court, on March 31, 1975, has already granted a writ of certiorari in United States v. Hampton, 74-5822 (Eighth Circuit, 74-1416, dec. Dec. 11, 1974), a case remarkably similar to that of Petitioners, differing only in that Petitioners' case presents some aspects of the Bueno entrapment defense in sharper focus.

(c) The entrapment question presented by Petitioners' case has not been, but should be settled, by this Court.

The facts and the resulting rule of the Bueno doctrine are crucially different from the facts and rationale involved in this Court's Russell decision. These differences are the source of the conflicting decisions among the Circuits. Russell dealt with

whether a government agent could infiltrate an already established and ongoing drug operation even to the extent of supplying the enterprise with a necessary but legal chemical, Russell, supra, p. 1643. This Court sanctioned such limited participation as a necessary procedure for apprehension of persons already engaged in ongoing secret criminal activity.

The Bueno Court however faced a different situation. In that case, the government agents were not infiltrating an ongoing drug operation, but rather supplying the very contraband with whose possession the Defendant was charged, and then the government turned around and re-purchased the same contraband, with whose sale the Defendant was charged. Relying on these crucial distinctions, the Fifth Circuit has asserted that the Bueno doctrine has continued validity notwithstanding Russell, United States v. Workopich, 479 Fed.2d 1142 (Fifth Circuit, 1974), United States v. Oquendo, 490 Fed.2d 161, (Fifth Circuit, 1974), and United States v. Moseley, 496 Fed.2d 1012 (Fifth Circuit, 1974).

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Recently, the Third Circuit joined the Fifth Circuit in this position, United States v. West, ___ Fed.2d ___ (Third Circuit, dec. Feb. 25, 1975; see 16 CrL 2526).

Furthermore, both the Fifth and Third Circuits rely on the fact that the Russell decision, while citing the Bueno case, not only did not by its express terms overrule Bueno, Workopich, supra, p. 1145, West, supra, but also expressly stated that this Court "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction," Russell, p. 1643. The Fifth and Third Circuits have found that the police conduct encompassed by the Bueno rule is precisely such a situation.

Other Circuits faced with analogous situations have come to the opposite conclusion. In United States v. Jett, 491 Fed.2d 1078 (First Circuit, 1974), and United States v. Johnson, 495 Fed.2d 242 (Tenth Circuit, 1974), the First and Tenth

Circuits respectively have held the Russell bars reliance on the Bueno defense. This Court has granted a writ of certiorari in United States v. Hampton, supra, in which the Eighth Circuit interpreted Russell to imply that Bueno is overruled. Finally, in the instant case, the Fourth Circuit has, impliedly and without a written opinion, denied Petitioners' claim that both the express holding in Russell and the pragmatic requirements of criminal detection underlying its rationale distinguish that case from Petitioners'.

Furthermore, Petitioners' case brings into clearer focus questions not presented by Hampton. In Hampton, the alleged government "drug source" testified in rebuttal of Hampton's testimony. At Petitioners' trial, government employee SE22084 did not testify, and no other rebuttal evidence was offered. Thus, unlike Hampton, Petitioners' case presents the question, decided in the affirmative by Bueno, supra, p. 906, Oquendo, supra, p. 163, Moseley, supra, p. 1015, and West, supra, whether the burden of disproving entrapment beyond a

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reasonable doubt requires the government to come forward with some evidence rebutting the Bueno defense, usually by producing the alleged government "drug source." The instant case also involves Petitioners who had never participated in drug offenses before, a factor heavily relied on by the Third Circuit in West, supra, to justify its demand that the government make some attempt to disprove the Bueno entrapment defense. Petitioners urge on this Court that whatever reasons moved this Court to grant certiorari in the Hampton case should argue even more strongly for the Petition in their case.

In sum, the Circuits are in conflict about whether Russell vitiates Bueno. This Court has not yet had before it, in Russell or any other case, a strict Bueno entrapment case. Prior cases before this Court involved the limits of permissible means of infiltrating ongoing drug operations, not situations in which the government created the drug operation itself by selling contraband to itself through the intermediary of an eventual defendant. The permissible limits of such creative activity

have not been, but should be, settled by this Court.

II. Whether the jury charge given by the Trial Court improperly shifted the burden of proof from the government to Petitioners by failing to include an instruction that inferences adverse to the government's case sufficient to raise a reasonable doubt could permissibly be drawn from the government's failure to produce government employee SE22084 where the witness was inaccessible to Petitioners, but, as a government employee, was accessible to the government, and by making a comment on the evidence that required the jury to speculate on matters not in evidence.

The crux of this second question presented for review involves the implications of the government's burden of disproving entrapment beyond a reasonable doubt, once the defense presents evidence to raise the issue. This burden is conceded by the government in its brief below, and is well established in decisions of Courts of Appeal, United States v. DeVore, 423 Fed.2d 1069 (Fourth Circuit, 1970), Notaro v. United States, 363 Fed.2d 169 (Ninth Circuit, 1966), United States v. Watson, 489 Fed.2d 504 (Third Circuit, 1973), United States v. Williams, 473 Fed.2d 507 (Fifth Circuit, 1973). While the Trial Court properly included in its general instructions on entrapment an explanation of

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the government's burden of disproving entrapment, both the Trial Court's refusal to give the missing witness instruction and the comment on the evidence effectively shifted the burden to Petitioners.

It is hornbook law that a reasonable doubt may not only arise from the evidence produced, but also from the lack of evidence, United States v. Higginbotham, 451 Fed.2d 1283 (Eighth Circuit, 1971). The lack of testimony in rebuttal from government employee SE22084 would justify an inference that her testimony would have corroborated Petitioners' entrapment defense since, as a government employee, she was accessible to the government, but inaccessible to Petitioners who do not even know her real name, and therefore properly required the missing witness instruction, United States v. Chase, 372 Fed.2d 453 (Fourth Circuit, 1967). By refusing to give the missing witness instruction, the Trial Court precluded the defense from establishing a reasonable doubt from the lack of testimony by government employee SE22084, thereby releasing the government from the burden of coming forth with any

evidence to disprove entrapment beyond a reasonable doubt.

The Trial Court's later comment on the evidence completed this shift of the burden of proof. The Trial Court posed the issue before the jury in the following terms: "Did the defendants already have a disposition to commit a crime and the person acting on behalf of the government merely presented the opportunity? . . . If you believe (Petitioner's) testimony, he and his wife are entitled to acquittal" (TR 94-95). However, the issue properly before the jury was whether the government had proved beyond a reasonable doubt that Petitioners had a prior disposition to create a crime, and whether Petitioner's testimony, even if not affirmatively believed, raised a reasonable doubt. Because there was no evidence before the jury that Petitioners had any disposition to crime prior to the importunings of government employee SE22084, the jury was required to speculate on matters not in evidence in order to fill in the holes in the government's case.

Petitioners maintain that this improper

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shifting of the burden of proof so far departed from the accepted and usual course of judicial proceedings judged in the light of the constitutional requirements of due process as to call for an exercise of this Court's power of supervision.

III. Whether Petitioners were denied counsel of their own choosing when the Trial Court refused to grant a brief continuance of trial because retained counsel of Petitioners' choice was temporarily too ill to represent them at trial.

The gravamen of Petitioners' third question presented for review is whether the Trial Court so abused its discretion and departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Denial of a brief continuance for good cause shown to permit counsel of Petitioners' choice to represent them at trial amounts to a denial of Petitioners' Sixth Amendment right to counsel, Glasser v. United States, 62 S.Ct. 457, 315 U.S. 60 (1941), Tolbert v. United States, 55 A.2d 91 (D.C., 1947), People v. Green, 248 N.E.2d 116, 42 Ill.2d 555 (1969). In English v. State, 259 A.2d 822, 8 Md. 330 (1969), it was held to be an abuse of

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judicial discretion to deny defendants a postponement of trial in order to allow defendants to be represented by counsel employed by them, rather than by the son and associate of their employed counsel.

There is no doubt that good cause was shown for a continuance: Petitioners' retained counsel, Mr. Bass, was too ill to carry on trial work adequately, since both he and his doctor had certified that Mr. Bass was suffering from chronic spastic collitis with acute exhaustion, and required a three week respite from trial work. Despite the Court's attempted justification, the mere fact that a lawyer can occasionally appear in his office is no reason to conclude that he is physically capable of the far more demanding and exhausting work of a trial. Evident in the Trial Court's comments was a marked hostility toward non-local counsel, and toward Petitioners because they had not retained local counsel (Hearing TR 5, 9, 10, 11).

The continuance sought, in addition to being for good cause shown, was for only a brief period, 30 days. No threat to the public interest in

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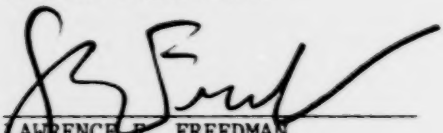
speedy trials was presented by the request since Petitioners were arrested on March 1, 1973. In sum, the refusal of the requested continuance represents an abuse of discretion amounting to a denial of Petitioners' Sixth Amendment right to counsel of their own choice, which Petitioner asks that this Court appropriately correct by the exercise of this Court's power of supervision.

Respectfully submitted,

HERBERT JEROME BASS



LAWRENCE E. FREEDMAN
(STEPHEN J. McCLURE on brief)
Attorneys for Petitioners

Date: April 5, 1975

Certificate of Service

I hereby certify that 3 true copies of the foregoing Petition for a Writ of Certiorari were mailed by first class mail, postage prepaid on the 5th day of April, 1975, to the following:

William B. Cummings,
United States Attorney
Eastern District of Virginia
Post Office Box 749
Alexandria, Virginia 22313

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The Solicitor General
Department of Justice
Washington, DC 20530

LAWRENCE E. FREEDMAN

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UNITED STATES COURT OF APPEALS

for the Fourth Circuit

Nos. 73-2130
73-2131

UNITED STATES OF AMERICA, Appellee,

versus

FRIEDA MADISON and
ROGER MADISON, Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued: February 6, 1975. Decided: March 6, 1975.

Before RUSSELL, FIELD and WIDENER, Circuit Judges.

Herbert Jerome Bass (Freedman, Freedman and Swersky on brief) for Appellant in Nos. 73-2130 and 73-2131; James R. Hubbard, Assistant United States Attorney (David H. Hopkins, United States Attorney and K. Gregory Haynes, Assistant United States Attorney, on brief) for Appellee in Nos. 73-2130 and 73-2131.

PER CURIAM:

Roger and Frieda Madison, husband and wife, appeal their convictions on three counts of possession with intent to distribute and distribu-

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tion of controlled substances in violation of 21 U.S.C. 841(a)(1). Upon consideration of the briefs, record and oral argument, we find no reversible error and accordingly affirm the convictions.

AFFIRMED.

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